U. S.
E D
MAR 4 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1230

ROBERT HAYNES,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Robert B. Smith,
Attorney at Law
420 Hightower Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

March, 1977

KING LAW BRIEF CO. • LEONHARDT BUILDING • OKLAHOMA CITY OKLA • 235-2969

TABLE OF CONTENTS

Page

Opinions Below 2
Jurisdiction 2
Question Presented 2
Constitutional Provisions Involved 3
Statement of the Case 4
Reasons for Granting the Writ 5
Conclusion 10

TABLE OF AUTHORITIES

Cases:

U.S. v. Harris, 534 F.2d 95 (1975), 7th Cir. 8,9
U.S. v. Matlock, 415 U.S. 164, 39 L.Ed. 242, 94 S.Ct. 988 (1974) 5-6,7, 8,9
U.S. v. Piet, 498 F.2d 178 (1974) 9

Statutes:

18 U.S.C., Sec. 371 4
18 U.S.C., Sec. 659 4
28 U.S.C.A., Sec. 1254 (1) 2

Other Authorities:

United States Constitution, Fourth Amendment 3
United States Constitution, Fourteenth Amendment 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

ROBERT HAYNES,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

COMES NOW your petitioner, Robert Haynes, and respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above styled case on the 22nd day of December, 1976.

OPINIONS BELOW

There was no formal opinion of the United States District Court. Excerpts of the transcript are included herein.

The opinion of the United States Court of Appeals for the Tenth Circuit, filed on the 22nd day of December, 1976, was published.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on the 22nd day of December, 1976. Thereafter, your petitioner filed a Petition for Re-Hearing, and on the 4th day of February, 1977, the same was overruled. The jurisdiction of this Court is invoked pursuant to the terms of 28 U.S.C.A., Sec. 1254 (1).

QUESTION PRESENTED

The sole issue raised by your petitioner herein is whether the government may properly introduce evidence obtained from a warrantless search of a mini-warehouse, based solely upon the consent of an unindicted co-conspirator who possessed no means of access to the premises.

The evidence put on by the government disclosed:

1. Lawrence Allen DuPont, at the instruction of your petitioner, Robert Haynes, rented a mini-warehouse storage for the storage of the stolen tires involved in the case at bar. The government's evidence disclosed that the money for the warehouse was provided by your petitioner, along with the money for the lock and key.

2. The evidence further disclosed that the consentor/DuPont was in the warehouse on two occasions.

The first occasion was to store the tires therein, and the second occasion was for the purpose of obtaining tires for his own personal use.

3. The evidence further disclosed that on both occasions he obtained the key to the warehouse from Robert Haynes and returned the key to Mr. Haynes afterwards.

4. The government's own evidence disclosed that DuPont did not have the key to the warehouse at the time of his consent.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

AMENDMENT IV - SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides in part as follows:

AMENDMENT XIV. - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

"Section 1. . . .nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Your petitioner herein, Robert Haynes, was one of seven individuals charged in the United States District Court for the Western District of Oklahoma on a two-count indictment.

The first count charged your petitioner with a violation of 18 U.S.C., Sec. 659, which prohibits the unlawful stealing or carrying away of chattels from a railroad car used in interstate commerce.

The second count charged your petitioner with conspiracy in violation of 18 U.S.C., Sec. 371, for conspiracy to violate the aforesaid substantive count.

The case involves the theft of some two hundred tires from a boxcar in the Santa Fe Railroad freight yard in Oklahoma City, Oklahoma, on the 25th day of December, 1974. The tires were placed in the mini-warehouse storage in question on the 2nd day of January, 1975 (See Tr. Vol. VI, page 338). Dupont, the consentor herein, rented the warehouse at the instruction of Haynes with the money also supplied by Haynes (See Tr. Vol. VII, page 12, and Tr. Vol. V, page 181, and Tr. Vol. V, page 148).

The testimony of the government witness further disclosed that Haynes supplied the money to purchase the padlock which was placed on the door of the mini-warehouse storage (See Tr. Vol. VI, page 340).

Testimony further disclosed that the keys to the padlock were turned over to Haynes (See Tr. Vol. VI, page 340).

DuPont signed a written consent form to the search of the warehouse and it was based solely upon his consent that the FBI made a search of the premises (See Tr. Vol. VI,

pages 174 thru 178, and page 223).

The testimony further disclosed that DuPont used the name Haney, one very confusingly similar with your petitioner's herein, in renting the mini-warehouse (See Tr. Vol. VII, pages 13 and 14); and, further, that it ws Haynes' idea to use that name (See Tr. Vol. V, page 148).

It was also the position of the consentor herein, DuPont, that he had no control over the premises (See Tr. Vol. V, page 182).

The evidence disclosed that after the tires were placed in the mini-warehouse the consentor herein, DuPont, had access to the building on one other occasion, for the purpose of obtaining two mud grips for his own use, and that after obtaining the key to enter the premises, he returned the key to Haynes (See Tr. Vol. V, page 183 and Tr. VI, pages 340 and 341).

The Trial Court and Court of Appeals in this cause based their decision of validating the search solely upon DuPont's having rented the warehouse for the benefit of Haynes and his two later entrances into the warehouse. It is, of course, the position of your petitioner that since, at the time of the consent, the consentor, DuPont, did not possess the key to enter the premises, and thus lacked total control over the warehouse, that he lacked the standing to validly give his consent to the search of the premises, vis-a-vis, your petitioner herein, Robert Haynes.

REASONS FOR GRANTING THE WRIT

This Court set out the applicable law for the problem involved of validating a search by the consent of third parties in the case of *U. S. v. Matlock*, 415 U.S. 164, 39 L.Ed.2d 242, 94 S.Ct. 988 (1974).

This Court pointed out that the government may justify a warrantless search by proof of the consent obtained from a third party "who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected." By footnote at page 171 of this Court's opinion, this Court pointed out that:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

The ultimate issue, therefore, presented to this Court is whether a third party without means of access to a premises can be considered to possess common authority or other sufficient relationship to the premises or effects sought to be inspected measured by a sufficient degree of mutual use of the property by a person having joint access or control for most purposes so that it is reasonable to recognize that that person has the right to consent to a search of those premises. The issue, then, defines itself to whether it is conceivable that a person who maintains the key, and thus exclusive means of access to the premises, might reasonably assume that another individual to whom he loaned the key on two prior occasions might, at a time when he did not possess the key, have the power within his own right to consent to a search of that premises. It is, of course, your petitioner's

position that a simple stating of the question suggests the answer as being that in the negative.

The Tenth Circuit Court used the above quoted language in *Matlock* in it's evaluation of the facts; however, it is herein submitted that the Court overlooked the importance of the sole control exercised by defendant over the keys to the warehouse, and thus sole access, while emphasizing the property relationship of the consenting party to the premises.

The Tenth Circuit Court found a "sufficient relationship to the *premises or effects* sought to be inspected" (Court's emphasis at page 15 of Court's opinion) necessary to validate the consent. This relationship apparently being founded on the facts that:

1. The consenting party was the lessee of the warehouse, with regard to the landlord.

2. The consenting party, after having relinquished control of the keys to the petitioner, later obtained the keys from petitioner and stored the tires in the warehouse.

3. The consentor obtained the keys from petitioner and took from the warehouse two tires which he needed for his own use.

A simple analysis of these three facts will indicate the error in the Tenth Circuit's logic in its application of the *Matlock* language. The first fact, that the consenting party was to the landlord the lessee of the premises, while being a correct proposition of property law, has no bearing on the issue of *control* of the premises. Facts two and three, that the keys were obtained from petitioner by the third party for the purposes first of storing the tires and later for the removal of two tires, and said keys being returned

immediately to the sole control of petitioner would indicate that the third party had access to the premises only at the express consent and authority of petitioner.

The decision of the United States Court of Appeals for the Tenth Circuit is in conflict with the decisions of the United States Court of Appeals for the Seventh Circuit on the same issue.

The case of *U. S. v. Harris,* 534 F.2d 95 (1976), 7th Cir., demonstrates that Court's view on this issue. In that cause, the government established that the consentor therein had known the defendant about three weeks and had been present at the defendant's apartment perhaps a dozen times, and had been alone in the defendant's apartment on one occasion. The Court, in the body of its opinion, set out the language of this Court in its *Matlock* decision relative to the common authority which a consentor must have. The Court, however, at page 97 of its opinion stated as follows:

> "Since Harris did not give Edwardsen a key, it can hardly be surmised that he expected Edwardsen to enter and leave the locked apartment at will. Under these facts, we are compelled to conclude that Edwardsen did not share with Harris the common authority over the premises necessary to validate consent to the warrantless search. This case quite clearly does not involve the mutual use of the property by persons generally having joint access or control for most purposes."

It is seen that the Court in the *Harris* decision was impressed with the language of this Court's decision in the *Matlock* case that the consentor must have that degree of control sufficient to impress in the minds of any co-inhabitant that he will have in his own right the power to permit the inspection of the premises. The Court found that

by withholding the key from the consentor in the *Harris* case, that the defendant there could not have presumed the power to permit a search in the consentor.

The case of *U. S. v. Piet,* 498 F.2d 178 (1974), 7th Cir., involved a consentor who was a warehouse foreman of the warehouse searched in the cause and who possessed a key to the premises searched. The Court, in its decision, set out the language of this Court in its *Matlock* decision and relied heavily on the fact that the consentor in that cause possessed the key to the premises searched, and thus had sufficient control in the premises.

This writer, in his research of the law in connection with this area, has found no cases where a search has been validated based upon the consent of one who did not possess the means of access to the premises searched. It is impossible to determine how it can be said that one without the power to enter the premises himself can grant a greater authority than he himself possesses. That is to say, in the instant case, DuPont had no power in his own right to enter the premises searched. On the two occasions he entered the premises, he did so only with the consent of Haynes and with Haynes giving him the key to the premises. On both occasions DuPont was required to return the key to the premises to Haynes. Since it was necessary for DuPont to obtain the consent of Haynes before he himself could enter the premises, a fortiori, it would be incumbent upon DuPont to obtain the consent from Haynes to give consent to another to enter the premises.

CONCLUSION

The petitioner herein submits that this Court should grant the Writ sought herein for the following reasons:

1. This Court has previously set out its requirement that a consentor must have joint access to premises before he can give his consent to the search of those premises. The consentor in this case had no means of access to the premises and, therefore, no joint access.

2. The Tenth Circuit Court is at variance with the holdings of the Seventh Circuit Court in its determination that one without means of access to the premises can consent to a search of those premises.

3. There has been no previous holding by this Court, any Circuit Court or District Court in this country to justify a consent given by one without means of access to the place to be searched.

Your petitioner, therefore, respectfully urges that this Court accept certiorari in this cause and upon considering this cause, to enter its order requiring the Tenth Circuit to modify its decision consistent with this Court's opinion.

Respectfully submitted,

Robert B. Smith
Attorney at Law
420 Hightower Building
Oklahoma City, Oklahoma 73102

March, 1977